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No. 04-177

Supreme Court, U.S.
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In The

Supreme Court of the United States

CHRISTY McKEE, and
PINTER ENTERPRISES, INC., d/b/a Club Juana,

Petitioners,

vs.

CITY OF CASSELBERRY, FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari
To The Florida Fifth District Court Of Appeal

PETITIONERS' REPLY TO RESPONSE IN OPPOSITION TO A WRIT OF CERTIORARI

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THE PRE-ENACTMENT EVIDENCE WAS INDEED SCANTY

The city challenges the statements by Ms. McKee and Club Juana that Casselberry's pre-enactment evidence was scanty, and, in so doing, it states that the city relied upon "[s]tudies from foreign jurisdictions regarding the secondary effects of the combination of alcohol and nudity; . . . " This assertion is contradicted by the record and the concessions of Ms. Babb, Casselberry's lawyer at trial.

> Ms. Babb: Your honor, objection. What governmental entities have done historically has no relevance to this case.
>
> * * *
>
> Ms. Babb: I thought we already established that its **not part of the city ordinance** that they relied on **foreign studies**, so I don't understand the relevance of what historically other cities have done.
>
> * * *
>
> Ms. Babb: Your honor, this is the exact same issue we dealt with with the previous witness. We don't – that's not in the ordinance. **It wasn't a rationale in adopting the ordinance.**
>
> Mr. Mason: So they're stipulating or not anything in this record regarding foreign studies for this court and some appellate court down the road they

> didn't rely upon any foreign studies of any kind?

(MR13/505-506).[1]

Granted, the city held several commission meetings, however, once the reader analyzes same, the "evidence" relied upon boils down to just a handful of documents and charts. This point was discussed during cross examination of the city's own expert, Dr. William George.

Dr. George conducted no studies for this particular case, instead he reviewed the charts and graphs Casselberry relied upon in passing its ordinance (R14/685-686). He was asked to review the Casselberry legislative record in support of its ordinance – all **eight pages** (R14/785-786; R9/1679-1685).

> Mr. Mason: Now, let's talk about the legislative record. How many pages in here, count it for me, that they gave you?
>
> Dr. George: 1, 2, 3, 4, 5, 6, 7, 8 pages.
>
> Mr. Mason: All right. Eight pages?
>
> Dr. George: Oh, wait. Hold on. But that also includes the ordinance itself, and then these descriptions of the ordinance are all the other pages. So it's what you said, 8 to 10 pages.

(R14/786).

Dr. George continued by describing these charts and graphs. Some of the charts simply reflect a comparison of

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[1] All emphasis in this paper has been added unless otherwise noted.

nudity regulations of adjoining Seminole County communities – which was the basis for the court's order upholding the ordinance.

Another document, generally referred to as the "Molson" document, was prepared by a police officer who made telephone calls to other local cities to determine crime statistics for various offenses. Yet, Molson wrote down the wrong numbers when he prepared his memorandum. He reported that there were twenty sexual batteries in the Seminole County city of Altamonte Springs, a city which has no adult venues, and eleven such reports in Casselberry (R9/1685). The correct numbers were actually twenty in Altamonte Springs and seven in Casselberry (R15/804-805).

When this fact was brought to the attention of Dr. George, he agreed that the entire document must be viewed as flawed, and that the city's evidence was unreliable.

> Dr. George: No. My point is that the information you're giving me if I look at this as a scientist the information you're giving me says, oh, these **data may be flawed**. They may be less than completely accurate, and I refer to that as unreliability.
>
> Now, the thing about unreliability as soon as you know that there's unreliability then you can generalize from that, and so if these are unreliable then I can generalize that some of the others are unreliable. Therefore, I can't reach any conclusions. It would be biased to know

> that some of these data are unreliable and apply the unreliability only to these (sic) data of Casselberry 1996 and deliberately not allow that same unreliability estimate to these data up here in Altamonte Springs in 1996, and just scientifically that's what you would do.
>
> You would take the information. Oh, this is wrong. It's not 11. It's a 7. All right. **Then that tells me that all these other numbers are probably a little wobbly too**, and so I then have to generate some recipe to determine the degree of wobbliness in these numbers and that's called an error variance estimate.
>
> **And so, yeah, if you tell me that there's unreliability, I'm going to presume there's unreliability in the others as well.**

(R15/805-806).

Contrary to the city's assertion, Judge Eaton did in fact reject the testimony of Dr. George. He referred to the research as "ridiculous," and compared Dr. George to the Emperor with No Clothes.[2]

> It is disappointing to realize that the federal government has wasted the tax payers' money on this ridiculous research. If Dr. George truly takes himself seriously, then perhaps he should, like

[2] In fact, toward the end of Dr. George's testimony the trial judge himself began challenging and questioning Dr. George.

> the Emperor in the tale by Hans Christian Anderson, check to see if his science is clothing or in his imagination.

McKee v. Casselberry, 10 Fla.L.Weekly Supp. 408a at n. 2 (Fla. 18th Jud. Cir. 2003).

A simple read of Judge Eaton's order demonstrates that he rejected the city's evidence and instead opted to uphold its ordinance under a political theory that Casselberry was constitutionally entitled to conform its nudity laws to those of the surrounding communities. However, not one word is devoted to addressing this issue in Casselberry's response.

If this attorney were wrong regarding the import of the record below, Casselberry would have provided the Court with record excerpts to correct same. It did not.

Further, the city conceded property values as an element of adverse secondary effects only when it became apparent that Club Juana was armed with voluminous documents and studies demonstrating the fallacy of this argument. This is another important concession because, as testified to by Club Juana's expert Dr. Danner, the concept of urban blight and deterioration goes hand-in-hand with crime.

ARE BATHING SUITS CONSTITUTIONALLY PERMISSIBLE UNDER *ALAMEDA, PAP'S* AND *O'BRIEN*?

A central point in this petition is whether the bathing suit requirement imposed on exotic dancers violates the fourth prong of *United States v. O'Brien,* 391 U.S. 367 (1968) as discussed by Justice O'Connor in *City of Erie v.*

Pap's A.M., 529 U.S. 277 (2000) and by the Eleventh Circuit in *Peek-A-Boo Lounge v. Manatee County*, 337 F.3d 1251 (11th Cir. 2003). Even before this Court, the city does not attempt to justify this highly restrictive bathing suit ordinance. Rather, its response is silent on the subject.

This court has never upheld a bathing suit requirement. The Eleventh Circuit all but invalidated one in *Peek-A-Boo*, and the Seventh Circuit recently invalidated an ordinance which also addressed heightened clothing attire. See *R.A.V. v. City of Rockford*, 361 F.3d 402 (7th Cir. 2004). Here, the trial judge accepted Dr. Hanna's statement that this amount of clothing destroys the er tic message conveyed in a striptease act. This point was accepted by the trial court and affirmed by the state Court of Appeal. Considering this, how could the ordinance be upheld?

THE CITY FAILS TO ADDRESS THE TRIAL JUDGE'S POLITICAL REASONING IN UPHOLDING THE ORDINANCE; CONTRARY TO THE SECONDARY EFFECTS MANDATE OF *ALAMEDA BOOKS*

Neither the trial judge nor the appellate court upheld this ordinance based upon the secondary effects doctrine/standard employed in *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002). Rather, this ordinance was upheld based upon pure political reasoning, specifically, that Casselberry was constitutionally permitted to conform its ordinance to other local cities in the region as a matter of **political equity**. Besides the fact that these other locales have no adult entertainment venues and their ordinances have never been subject to challenge, this is simply an absurd result under *Alameda Books*. If that

was the standard, *Alameda Books* would be a legal fiction and a superfluous act on the part of this Court. Despite the fact that the trial court's order departs from this Court's precedent, the city ignores this issue in its response. The city should be required to address the issues on the merits.

THE FIFTH DISTRICT AFFIRMED THE TRIAL JUDGE'S ORDER. THAT DECISION IS WITHIN THIS COURT'S JURISDICTION

The city is well aware that Ms. McKee and Club Juana could not seek review with the Florida Supreme Court based upon a per curium affirmance issued by the state District Court of Appeal. In 1980 the Florida Constitution was amended abolishing "certiorari review" at the Florida Supreme Court and replacing it with a more narrow form of review called "discretionary review." See generally *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980). As such, the Club Juana PCA was not reviewable by the Florida Supreme Court and the Fifth District Court's decision is a final reviewable decision in this case.

The city now incorrectly argues that this court is likewise foreclosed from reviewing a PCA from a state District Court. The Supreme Court of the United States is a court of certiorari review not a more narrow form of review as described in the Florida Constitution. Furthermore, this Court recently granted a petition for writ of certiorari from the same Florida Court of Appeal from the issuance of a PCA. See *Corona v. Florida,* 124 S.Ct. 1658 (2004).

ALCOHOL/NUDITY ORDINANCES ARE REVIEWED UNDER THE SAME SECONDARY EFFECTS STANDARD AS ANY OTHER PUBLIC NUDITY ORDINANCE

The city continues to argue that ordinances which prohibit public nudity at establishments which are licensed to sell alcohol are permissible under the Twenty-First Amendment theory originally upheld in *California v. LaRue*, 409 U.S. 109 (1972). As stated in Club Juana's petition, that theory has been overruled and replaced with the secondary effects justification set forth in *Alameda Books*.

> However, contrary to the commission's apparent belief, the fact that the challenged restrictions regulate liquor licenses does not affect the level of scrutiny. **To be sure, the Supreme Court originally did embrace** the view that the Twenty-First Amendment creates an "added presumption in favor of the validity" of state liquor regulations (citations and internal quotes omitted). However, **the court has since specifically disavowed this approach**.

Giovani Carandola, Ltd. v. Bason, 303 F.3d 507, 513, n. 2 (4th Cir. 2002).

* * *

> In *44 Liquormart*, the court clarified both the proper analysis and the appropriate scope of liquor regulations intended to protect public decency (citation omitted). The court explained that such liquor regulations **must be analyzed in the same manner as any other public decency regulation** – the Twenty-First Amendment gives the

> states no additional authority to restrict First Amendment rights.

Giovani at 519.

In other words, from a constitutional perspective, Casselberry's ordinance is treated no differently than Seminole County's public nudity ordinance.[3] Either there was credible evidence of adverse secondary effects accepted by the fact finder or there was not.

CONCLUSION

Courts and litigants across this country need guidance and instruction from this Court on the full import of the *Alameda Books'* standard. See generally, *J.L. Spoons, Inc. v. Morckel,* 314 F.Supp.2d 746, 756 (ND OH 2004) ["clearer guidance in this area would greatly aid the court . . ."]. That is one of the reasons it is so important for this Court to accept and review this case.

Respectfully submitted this 5 day of October, 2004.

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[3] Additionally, contrary to the city's statements this Court has stated that a constitutional right cannot be denied simply because it can be exercised somewhere else. *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 77 (1981).